The Ka Wah Bank Ltd v Nadinusa Sdn Bhd & Anor

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–726 OF 1993
CHONG SIEW FAI CJ (SABAH AND SARAWAK), PEH SWEE CHIN AND MOHAMED DZAIDDIN FCJJ
12 MARCH 1998

***Contract** — Agency — Solicitor — Client was abroad — Matter within the ordinary authority of counsel — Whether consent of the client needed — Whether client was bound by compromise entered into by counsel in the absence of the client*

***Contract** — Formation — Agreement to compromise/settle suits — Correspondence between both parties — Proper approach to consider all correspondence — Whether upon true construction there is an offer substantially accepted in terms which constitute a contract*

The appellant ('the bank') is a limited company incorporated in Hong Kong and the first respondent ('Nadinusa') is a private limited company incorporated under the Companies Act 1965 whilst the second respondent ('Hashbudin') was a director and shareholder of Nadinusa. The respondents were customers of the bank and had been granted banking facilities. Sometime in 1986, the respondents defaulted in repaying various sums of money owed to the bank under these facilities. The bank then commenced three suits against them.

The respondents, being the plaintiffs in the court below, by their solicitors Messrs Sri Ram, Zulkifli and Kumar ('Sri Ram & Co') commenced an action against the bank on 4 November 1988 claiming that the first, second and third suits had been settled. They averred that the first suit had been compromised and a settlement in respect thereof had been effected by an exchange of correspondence passing between their solicitors, Sri Ram & Co, John Gomez & Associates, and a duly authorized agent of the bank. It was contended that these letters taken together and read as a whole constituted a binding agreement between Hashbudin and the bank compromising the first suit upon the terms that in full and final settlement of Hashbudin's personal account with the bank, Hashbudin would deliver to the bank 1.3m shares in Worldwide Holdings Bhd ('Worldwide') together with blank transfer forms duly executed. Hashbudin would then refrain from filing any injunction restraining the transfer of the Worldwide shares and the bank would discontinue the first suit. The respondents further averred that the second and third suits had also been compromised and a settlement thereof had been effected between them on the one hand and the bank on the other by an exchange of another set of letters passing through their respective solicitors. The respondents contended that the said correspondence taken together and read as a whole constituted a binding agreement between the parties compromising the second and third suits.

In the defence, the bank denied that the compromise of the first suit was based on the said letters and further averred that the compromise was reached on the basis of two letters exchanged between the bank's solicitors, Messrs Chooi & Co and Hashbudin's solicitors, Sri Ram & Co, whereby it was agreed that in full and final settlement of Hashbudin's personal account with the bank, Hashbudin was required to deliver to the bank's solicitors duly executed, valid and registrable transfer forms in respect of 175 x 1,000 shares of Worldwide; and Hashbudin's unconditional and irrevocable undertaking that he would not, after the delivery of the transfers, file any action to restrain the sale of the said shares. The bank claimed that Hashbudin failed to perform his obligations of the terms of the settlement. The bank further averred that no compromise or settlement had been effected between the bank and the respondents based on the said letters in respect of the second and third suits.

The trial judge concluded that the first suit was settled by an offer in the letter P5 and its acceptance in P9. He found that P5 contained a definite offer to conclude an agreement and P9 an acceptance of the said offer. In respect of the second and third suits, he also found that the letter P11 by John Gomez & Associates — solicitors for Kaziz Sdn Bhd who were interested in buying the Worldwide shares — to the bank constituted a definite letter of offer. The appellant appealed against the decision of the judge on two principal grounds. The first ground was on the learned judge's finding that the first, second and third suits had been settled and compromised on the basis of the series of letters exchanged between the parties. The second ground related to the question of an apparent or ostensible authority of an agent.

Held, dismissing the appeal in respect of the first suit but allowing the appeal on the second and third suits:

(1) The proper approach was to consider the whole correspondence to see whether upon their true construction there was to be found in them an offer substantially accepted in terms which constitute a contract. Having examined the correspondence exchanged between the parties, it was agreed that an agreement to compromise the first suit was concluded on the basis of P5 and P9. P5 was a letter of offer containing terms of settlement and not merely a reply to John Gomez & Associates' letter, P4, which sought the bank's view on the proposed settlement of Worldwide shares account. It could be inferred from the terms mentioned in P5 that the bank was making an offer to settle the first suit whereby it confirmed that it would agree to discontinue the first suit upon the terms specified therein. The letter contained proposed settlement arrangements and concluded with a request that the bank be informed if the arrangements were acceptable to Hashbudin's lawyers. Reading the whole letter together with the other correspondence, the only conclusion was that P5 contained

an offer to settle the first suit on the terms stated therein (see pp 366F, 367H–I and 368A–E); *Gibson v Manchester CC* [1979] 1 WLR 294 followed. A

(2) By P9, Sri Ram & Co on behalf of their client, accepted the offer and confirmed their agreement to the terms set out in P5. Hence, an agreement to settle the first suit was concluded when Sri Ram & Co communicated their client's acceptance of the terms of the offer in P5. The solicitors had the authority to accept the offer on behalf of their client who was abroad. Consent of the client was not needed for a matter which was within the ordinary authority of counsel, and if a compromise was entered into by counsel in the absence of the client, the client was bound. Therefore, upon the true construction of the correspondence, the learned judge did not err in law or in fact in holding that the first suit had been compromised (see pp 368E–G and 369B). B C

(3) The learned judge did not give reasons for his conclusion that P11 contained a definite offer to settle the second and third suits. His Lordship misdirected himself in relying on the oral evidence of John Gomez, who stated that P11 was a letter of offer. Whether or not P11 constituted a definite offer was a question of construction. Reading P11 together with the correspondence pleaded in the statement of claim, it was not a letter of offer. P11 was written by John Gomez to the bank for the purpose of confirming an earlier telephone conversation between him and the bank concerning the bank's desire to settle the two suits on the terms mentioned therein and for John Gomez to mention this to Hashbudin's solicitors. P11 was merely a preliminary communication between John Gomez & Associates and the bank, confirming the earlier discussion between John Gomez & Associates and the bank. Therefore, the learned judge's finding that P11 was a definite letter of offer could not be agreed with. D E F

Furthermore, P15 could not in law constitute an acceptance. An acceptance is a final and unqualified expression of assent to the terms of the offer. But, where the reply is qualified or attempts to vary the terms of the offer or attempts to accept an offer on new terms (not contained in the offer), then such a reply is not a communication of an acceptance but may be a rejection accompanied by a counter-offer which the original offeror can accept or reject. In the light of the conditions put forward by Sri Ram & Co in P15 that the bank gave an undertaking to withdraw the two suits and that each party was to pay their own costs, which terms were not in P11, P15 therefore did not constitute a final acceptance of the bank's terms of the offer, but an attempt by the offeree to vary the original offer in P11 to include new terms on undertaking and costs. In the circumstances, there was no concluded contract. The learned judge had erred in law on his finding that from the evidence and the exhibits, the parties had come to a definite and complete agreement in respect of the settlement of the second and third suits (see pp 369C–H and 370E–H). G H I

A **[Bahasa Malaysia summary**

Perayu ('bank tersebut') merupakan sebuah syarikat berhad yang ditubuhkan di Hong Kong dan penentang pertama ('Nadinusa') adalah sebuah syarikat persendirian berhad yang ditubuhkan di bawah Akta Syarikat 1965 manakala penentang kedua ('Hashbudin') adalah B seorang pengarah dan pemegang saham Nadinusa. Penentang-penentang adalah pelanggan bank dan telah diberikan kemudahan perbankan. Pada tahun 1986, penentang-penentang telah ingkar dalam membayar balik pelbagai jumlah wang yang terhutang kepada bank tersebut di bawah kemudahan ini. Bank tersebut kemudiannya memulakan tiga guaman terhadap mereka.

C

Penentang-penentang, yang merupakan plaintif-plaintif di mahkamah bawah, menerusi peguambela mereka Tetuan Sri Ram, Zulkifli dan Kumar ('Sri Ram & Co') memulakan satu tindakan terhadap bank tersebut pada 4 November 1988 dengan menuntut bahawa guaman pertama, kedua dan ketiga telah diselesaikan. Mereka D menegaskan bahawa guaman pertama telah dikompromi dan satu penyelesaian berkenaan dengannya telah dilaksanakan melalui pertukaran surat-menyurat yang beralih di antara peguamcara mereka, Sri Ram & Co, John Gomez & Associates, dan seorang ejen bank tersebut yang diberi kuasa. Adalah dihujahkan bahawa surat-surat ini E diambil bersama dan dibaca secara keseluruhan membentuk perjanjian yang mengikat di antara Hashbudin dan bank tersebut mengkompromi guaman pertama dengan terma bahawa pada penjelasan penuh dan muktamad akaun peribadi Hashbudin dengan bank tersebut, Hashbudin akan menyerah 1.2 juta saham dalam Worldwide Holdings F Bhd ('Worldwide') kepada bank tersebut bersama borang pemindahan yang kosong yang dilaksanakan seperti yang sepatutnya. Hashbudin tidak akan memfailkan apa-apa injunksi yang menahan pemindahan saham Worldwide dan bank tersebut akan memberhentikan guaman pertama. Penentang-penentang selanjutnya menegaskan bahawa guaman kedua dan ketiga juga telah dikompromi dan penyelesaiannya G telah dilaksanakan di antara mereka pada satu pihak dan bank tersebut pada pihak yang lain menerusi pertukaran satu lagi set surat yang beralih di antara peguamcara masing-masing. Penentang-penentang menghujahkan bahawa surat-menyurat tersebut diambil bersama dan dibaca secara keseluruhan membentuk perjanjian yang mengikat di H antara pihak-pihak mengkompromi guaman kedua dan ketiga.

Dalam pembelaan, bank tersebut menafikan bahawa kompromi guaman pertama adalah berdasarkan surat tersebut dan selanjutnya menegaskan bahawa kompromi dicapai berdasarkan dua surat yang ditukar di antara peguamcara bank tersebut, Tetuan Chooi & Co dan peguamcara Hashbudin, Sri Ram & Co, di mana ia dipersetujui I bahawa sebagai penjelasan penuh dan muktamad akaun peribadi Hashbudin dengan bank tersebut, Hashbudin dikehendaki menyerahkan borang pemindahan yang dilaksanakan, sah dan boleh didaftarkan kepada peguamcara bank tersebut berkenaan dengan

175 x 1,000 saham Worldwide; dan akujanji Hashbudin bahawa selepas penyerahan pemindahan, dia tidak akan memfailkan apa-apa tindakan bagi menahan jualan saham tersebut. Bank tersebut mendakwa bahawa Hashbudin gagal melaksanakan obligasinya atas terma penyelesaian. Bank tersebut seterusnya menegaskan bahawa tiada kompromi atau penyelesaian telah dilaksanakan di antara bank tersebut dan penentang-penentang berdasarkan surat tersebut berkenaan dengan guaman kedua dan ketiga.

Hakim perbicaraan menyimpulkan bahawa guaman pertama diselesaikan oleh satu tawaran dalam surat P5 dan penerimaannya dalam P9. Beliau mendapati bahawa P5 mengandungi satu tawaran yang pasti untuk mencapai perjanjian dan P9 penerimaan tawaran tersebut. Berkenaan dengan guaman kedua dan ketiga, dia juga mendapati bahawa surat P11 oleh John Gomez & Associates — peguamcara untuk Kaziz Sdn Bhd yang berminat membeli saham Worldwide — kepada bank tersebut membentuk surat tawaran yang pasti. Perayu merayu terhadap keputusan hakim atas dua alasan utama. Alasan yang pertama adalah atas keputusan hakim yang arif bahawa guaman pertama, kedua dan ketiga telah diselesaikan dan dikompromi atas dasar siri surat yang ditukar-tukar di antara pihak-pihak. Alasan kedua berkaitan dengan persoalan kuasa zahir seorang ejen.

Diputuskan, menolak rayuan berkenaan dengan guaman pertama tetapi membenarkan rayuan atas guaman kedua dan ketiga:

(1) Pendekatan yang betul adalah untuk mempertimbangkan surat-menyurat keseluruhan bagi memperlihatkan sama ada pada tafsiran yang benar terdapat tawaran yang telah diterima secara substantial dalam terma yang membentuk satu kontrak. Setelah meneliti surat-menyurat yang bertukaran di antara pihak-pihak, ia disetujui bahawa suatu perjanjian untuk kompromi guaman pertama tercapai berdasarkan P5 dan P9. P5 merupakan surat tawaran yang mengandungi terma penyelesaian dan bukanlah sekadar menjawab surat daripada John Gomez & Associates, P4, yang meminta pendapat bank tersebut mengenai penyelesaian bank tersebut atas penyelesaian akaun saham Worldwide yang dicadangkan Worldwide. Ia boleh disimpulkan daripada terma yang dinyatakan dalam P5 bahawa bank tersebut membuat tawaran untuk menyelesaikan guaman pertama di mana ia mengesahkan bahawa ia akan bersetuju pada terma yang digaris di bawahnya. Surat tersebut mengandungi aturan penyelesaian yang dicadangkan dan mengakhiri dengan permintaan bahawa bank tersebut diberitahu sekiranya aturan boleh diterima oleh peguam Hashbudin. Dengan membaca surat itu secara keseluruhan bersama surat-menyurat lain, satu-satunya kesimpulan adalah bahawa P5 mengandungi tawaran untuk menyelesaikan guaman pertama pada terma yang dinyatakan dalamnya (lihat ms 366F, 367H–I dan 368A–E); *Gibson v Manchester CC* [1979] 1 WLR 294 diikut.

(2) Melalui P9, Sri Ram & Co bagi pihak klien mereka, telah menerima tawaran itu dan mengesahkan persetujuan mereka kepada terma yang dinyatakan dalam P5. Justeru itu, perjanjian untuk menyelesaikan guaman pertama tercapai apabila Sri Ram & Co menyampaikan penerimaan terma tawaran dalam P5 oleh klien. Peguamcara mempunyai kuasa untuk menerima tawaran bagi pihak klien mereka yang berada di luar negeri. Izin klien tidak perlu untuk perkara yang berada dalam kuasa biasa peguam, dan andainya kompromi diikat oleh peguam dalam ketiadaan klien, klien adalah terikat. Maka, pada tafsiran sebenar surat-menyurat itu, hakim yang arif tidak terkhilaf dalam undang-undang atau fakta dalam memutuskan bahawa guaman pertama telah dikompromi (lihat ms 368E–G dan 369B).

(3) Hakim yang arif tidak memberi alasan untuk kesimpulan beliau bahawa P11 mengandungi satu tawaran yang pasti untuk menyelesaikan guaman kedua dan ketiga. Beliau telah menyalah arah dirinya dalam bergantung pada keterangan lisan John Gomez, yang menyatakan bahawa P11 adalah surat tawaran. Sama ada atau tidak P11 membentuk satu tawaran yang pasti adalah persoalan tafsiran. Dengan membaca P11 bersama dengan surat-menyurat yang diplidkan dalam pernyataan tuntutan, ia bukanlah surat tawaran. P11 ditulis oleh John Gomez kepada bank tersebut untuk tujuan mengesahkan perbualan telefon yang lebih awal di antara dirinya dan bank tersebut mengenai hasrat bank tersebut untuk menyelesaikan dua guaman pada terma yang disebut dalamnya dan supaya John Gomez menyebut hal ini kepada peguamcara Hashbudin. P11 cumalah komunikasi permulaan di antara John Gomez & Associates dan bank tersebut, mengesahkan perbincangan yang lebih awal di antara John Gomez & Associates dan bank tersebut. Oleh itu, keputusan hakim yang arif bahawa P11 adalah satu surat tawaran yang pasti tidak boleh disetujui.

Tambahan pula, P15 tidak mungkin membentuk satu penerimaan di sisi undang-undang. Sesuatu penerimaan adalah 'penyataan persetujuan yang muktamad dan tidak bersyarat' kepada terma tawaran. Akan tetapi, di mana jawapan adalah bersyarat atau cuba mengubah terma tawaran atau cuba menerima tawaran atas terma baru (yang tidak terkandung dalam tawaran itu), maka jawapan sedemikian bukanlah komunikasi penerimaan tapi mungkin satu penolakan yang diiringi oleh tawaran balas yang mana pembuat tawaran yang asal boleh terima atau tolak. Memandangkan syarat-syarat yang dikenakan oleh Sri Ram & Co dalam P15 bahawa bank tersebut memberi akujanji untuk menarik balik dua guaman itu dan bahawa setiap pihak membayar kos sendiri, yang termanya tidak didapati dalam P11, maka P15 tidak membentuk penerimaan muktamad terma bank tersebut atas tawaran itu, tetapi usaha oleh penerima tawaran untuk mengubah tawaran asal dalam P11 supaya termasuk terma baru tentang akujanji dan kos. Dalam keadaan ini, tiada kontrak telah

diikat. Hakim yang arif terkhilaf di sisi undang-undang atas keputusan beliau bahawa daripada keterangan dan fakta-fakta, pihak-pihak telah mencapai perjanjian yang pasti dan sempurna berkenaan dengan penyelesaian guaman kedua dan ketiga (lihat ms 369C–H dan 370E–H).]

Notes

For a case on agency of solicitor, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1137.

For cases on formation of contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2152–2212.

Cases referred to

Gibson v Manchester CC [1979] 1 WLR 294 (folld)
Mathews v Munster (1888) 20 QBD 141 (refd)
Yap Chee Meng v Ajinomoto (M) Bhd [1978] 2 MLJ 249 (refd)

Legislation referred to

Companies Act 1965

Appeal from: Civil Suit No D4–22–224 of 1988 (High Court, Kuala Lumpur)

Ira Biswas (*Chooi & Co*) for the appellant.
Manjit Singh (*F Bodipalar* with him) (*Sri Ram & Co*) for the respondents.

Cur Adv Vult

Mohamed Dzaiddin FCJ (delivering judgment of the court): The appellant ('the bank') is a limited company incorporated in Hong Kong and carrying on banking business at its branch at 232 Des Voeux Road, Central, Hong Kong. The first respondent ('Nadinusa') is a private limited company incorporated under the Companies Act 1965 whilst the second respondent ('Hashbudin') was at all material times, a director and shareholder of Nadinusa. The respondents were customers of the bank and had been granted banking facilities. Sometime in 1986, the respondents defaulted in repaying various sums of money owed to the bank under these facilities. The bank then commenced the following pleading against them:

(a) In Kuala Lumpur High Court Civil Suit No 3447 of 1986 (the first suit) the bank's claim against Hashbudin was for the sum of RM7,870,849.19 together with interest thereon at the rate of RM3,722.28 per day from 1 September 1986 until judgment and interest on the judgment debt at the rate of 8% per annum from the date of judgment to the date of realization and costs. Hashbudin, in his defence, admitted taking the loan but pleaded that the purpose of the said loan was to purchase 1.3m shares in Worldwide Holdings Bhd

('Worldwide'). In his counterclaim, Hashbudin asked for an order, inter alia, directing the bank to deliver up to him the share certificates in respect of the 1.3m shares of Worldwide. On 7 and 8 January 1988, the bank caused to be issued stop notices in respect of the 1.3m shares.

(b) In Kuala Lumpur High Court Civil Suit No 84 of 1987 (the second suit) Hashbudin was sued as a guarantor for Nadinusa for various sums of money in respect of past due bills, outstanding overdraft facility and in respect of outstanding sum under a standby letter of credit and interest. On 26 November 1987, summary judgment was entered against Hashbudin by the court. Hashbudin had appealed to the judge in chambers.

(c) In Kuala Lumpur High Court Originating Summons No 369 of 1986 (the third suit) the bank sought declarations against Nadinusa, Malayan United Bank Bhd and Malayan United Finance Bhd and its nominees that the shares in Supreme Finance Bhd ('SF shares') were pledged by Nadinusa; that the 4,050,000 SF shares were pledged by Supreme Corp Bhd; and that SF shares registered in MUI's nominee were held on behalf of the bank.

In addition, there were two other actions which arose from the above suits. In Kuala Lumpur High Court Originating Summons No 4290 of 1986, Malayan United Bank Bhd ('MUI Bank') became the plaintiff, and Nadinusa and the bank the first and second defendant respectively and in Kuala Lumpur High Court Bankruptcy No D2–43–2872–88, the bank filed a bankruptcy action against Hashbudin.

Pleadings

In the instant case, the respondents, being the plaintiffs in the court below, by their solicitors Messrs Sri Ram, Zulkifli and Kumar (for short Sri Ram & Co) commenced an action against the bank on 4 November 1988 claiming, inter alia, that the first, second and third suits had been settled. By para 9(b) of the statement of claim, they averred that the first suit had been compromised and a settlement in respect thereof had been effected by an exchange of correspondence passing between their solicitors, Sri Ram & Co, John Gomez & Associates, and a duly authorized agent of the bank. The letters relied on by Hashbudin are dated 29 April, 3 May, 4 May, 9 May and 10 May 1988 marked as P3, P4, P5, P6 and P7 respectively. We shall refer to these letters in more detail shortly. By para 9(c), it was contended that these letters taken together and read as a whole constituted a binding agreement between Hashbudin and the bank compromising the first suit upon the terms that in full and final settlement of Hashbudin's personal account with the bank, Hashbudin would deliver to the bank the Worldwide shares together with blank transfer forms duly executed. He would also deliver to the bank duly executed resignation letters of all the directors and secretary of Worldwide together with an undated resolution appointing new directors and a secretary. Hashbudin would then refrain from filing any injunction restraining the transfer of the Worldwide shares and the bank would discontinue the first suit.

Further, by para 10 of the statement of claim, the plaintiffs averred that the second and third suits had also been compromised and a settlement thereof had been effected between them on the one hand and the bank on the other by an exchange of another set of letters passing through their respective solicitors. These letters had been identified and marked as P11, P12, P15, P16, P17 and P29. The plaintiff contended that the said correspondence taken together and read as a whole (together with the set of letters referred to in para 9(b) hereof) constituted a binding agreement between the parties compromising the second and third suits. Lastly, by para 14, they averred that the bank was estopped from denying that the second and third suits had been compromised.

In the defence, the bank denied that the compromise of the first suit was based on the letters set out in para 9(b) of the statement of claim. By para 8 of the defence, it averred that the compromise was reached on the basis of two letters exchanged between the bank's solicitors, Messrs Chooi & Co and Hashbudin's solicitors, Sri Ram & Co, whereby it was agreed that in full and final settlement of Hashbudin's personal account with the bank, Hashbudin was required to deliver to the bank's solicitors duly executed, valid and registrable transfer forms in respect of 175 x 1,000 shares of Worldwide; and Hashbudin's unconditional and irrevocable undertaking that he would not, after the delivery of the transfers, file any action to restrain the sale of the said shares. The bank claimed that Hashbudin failed to perform his obligations of the terms of the settlement as per para 8 of the defence.

The bank also denied para 10(a), (b) and (c) of the statement of claim and averred that no compromise or settlement had been effected between the bank and the respondents based on the letters in 10(b) in respect of the second and third suits.

With respect to the first suit, it may be recalled from the evidence that John Gomez was the solicitor for Kaziz Sdn Bhd who was interested to buy the 1.3m Worldwide shares from the bank. On receipt of his client's instruction, John Gomez spoke on the phone with Mr BK Lim of the bank, allegedly the bank's authorized agent, regarding the settlement of Hashbudin's loan account of RM7m. On 29 April 1988, John Gomez then spoke to Mr V Kumar of Sri Ram & Co, solicitors for Hashbudin, about the proposed terms which they agreed. On 3 May 1988, John Gomez & Associates wrote to the bank, for the attention of Mr BK Lim, informing the latter about the arrangements for settlement of Hashbudin's account.

On 4 May 1988, the bank replied (P5) to John Gomez & Associates:

> We refer to your letter dated 3 May 1988.
>
> We confirm that we have all the 1.3m Worldwide shares and all transfer forms except for 175,000 shares registered in the name of Rothputra Nominees Sdn Bhd. We confirm that the bank will accept all 1.3m shares in Worldwide, together with transfer forms for all 1.3m shares duly executed in blank, as full and final settlement of Mr Hashbudin Hashim's personal loan account with the bank.

A We further confirm that the bank will agree to discontinue the pending action under Kuala Lumpur High Court Civil Suit No C4–23–3447–86 with parties having no claim against the other and on the basis that each party pays its own costs.

Mr Hashbudin Hashim and/or his nominees must deliver to our solicitors, Messrs Chooi & Co duly executed blank transfer forms for the B 175,000 Worldwide shares referred to above.

As part of our settlement, Mr Hashbudin Hashim and/or his nominees must undertake not to file any court injunction restraining the transfer of all the 1.3m Worldwide shares.

If the proposed settlement arrangements are acceptable to C Mr Hashbudin's lawyers, please let us know.

By P6, Messrs John Gomez & Associates forwarded a copy of P5 to Sri Ram & Co for their client's confirmation of the proposed terms. In the meantime, on 10 May 1988, the bank wrote P7 enquiring whether its proposed terms of settlement were acceptable to Sri Ram & Co and D whether John Gomez & Associates had received further instruction from Kaziz regarding the 1.3m Worldwide shares. A copy of this letter was extended by John Gomez & Associates to Sri Ram & Co.

On 10 May 1988, Sri Ram & Co replied to John Gomez & Associates (P9) as follows:

E We refer to the above matter and your letter dated 9 May 1988.

We write to confirm that our client is in agreement with the terms set out in The Ka Wah Bank Ltd's letter dated 4 May 1988.

As our client is presently abroad, we shall revert with the necessary documents soonest possible.

F On receipt of the letter, John Gomez & Associates informed the bank by fax to the effect that its terms had been accepted by solicitors for Hashbudin and in the meantime, they were proceeding to obtain the relevant documents from the said solicitors and would let the bank have the same in due course.

G It is important to remember that the bank's defence was that the compromise in respect of the first suit was concluded on the basis of letters passed between the bank's solicitors, Chooi & Co and Sri Ram & Co. Before the High Court, it was submitted that on 31 May 1988, Chooi & Co wrote D24 to Sri Ram & Co stating that the bank was agreeable to withdraw and discontinue the first suit on the terms and conditions stated H therein. On 8 July 1988, Sri Ram & Co replied as follows (D37):

KL HC CS No C4–23–3447–86

Your letter dated 31 May 1988 bears reference.

We enclose herewith the transfer forms duly executed to be used solely I for the following share certificate Nos:

8790 – 8799

8800 – 8851

8853 – 8900

8901 – 8930
8931 – 8935
8936 – 8938
8940 – 8966

Our client is agreeable to giving your clients an unconditional and irrevocable undertaking that he will not after the delivery of the abovementioned transfers, file any action in a competent court to seek an order restraining the sale of the shares and the return to your clients of the same whether in specie or otherwise and that each party shall be responsible for its own legal costs in connection with the action.

Kindly take steps to discontinue the above-mentioned action.

Deliberation of the learned judge

His Lordship carefully examined the letters to see whether, on their true construction and taken as a whole, there was an offer and acceptance giving rise to a concluded agreement. Indeed, with respect to the first suit, his Lordship posed the following question: The question for the court to consider here was whether these letters constituted an agreement that the first suit had been compromised. And after considering the submissions of counsel, he narrowed the issue by stating that the question was whether the first suit was compromised on the basis of P5 and P9 or D24 and D37. For reasons which we shall discuss shortly, his Lordship concluded that the first suit was settled by an offer in P5 and its acceptance in P9. He found P5 contained a definite offer to conclude an agreement and P9 an acceptance of the said offer.

Turning to the role of En John Gomez in the settlement of the first suit, his Lordship agreed with the bank's contention that neither he nor his firm, John Gomez & Associates, acted as agent for the bank. The learned judge, however, found that at all material times John Gomez & Associates were solicitors for Kaziz who was interested in buying the Worldwide shares, and that in his earlier communications on behalf of Kaziz with BK Lim of the bank and V Kumar of Sri Ram & Co, John Gomez had sounded to them regarding the settlement of the first suit because his client wanted to buy those shares. Subsequently, John Gomez became involved in the negotiations. But, ultimately it was the bank and Sri Ram & Co who negotiated through John Gomez in concluding the agreement to settle the first suit. His Lordship relied on Sri Ram & Co's letter to John Gomez & Associates dated 29 April 1988 (P3) and the bank's letter (P4) as evidence of the negotiations between the parties through John Gomez & Associates.

Regarding BK Lim, his Lordship held that he had the authority to negotiate on behalf of the bank. In his view, what BK Lim had done in respect of the settlement of the first suit was to confer or discuss the matter with John Gomez with a view of finding a settlement. After the negotiations, the bank wrote P5 which was signed by BK Lim and another officer, both being the authorized signatories of the bank.

With regard to the second and third suits (the Supreme Finance suits), his Lordship examined the six letters pleaded in para 10(a) of the statement of claim to determine whether an agreement was concluded in respect of the settlement of the second and third suits. His Lordship found the following letter, P11, from John Gomez & Associates to the bank dated 10 May 1988 to constitute a definite letter of offer:

> The Ka Wah Bank Ltd
> 232 Des Voeux Road
> C, Hong Kong By Facsimile
>
> fao: Mr BK Lim
>
> Dear Sirs,
>
> Re: Nadinusa Sdn Bhd's account with The Ka Wah Bank Ltd
>
> This is to confirm the telephone conversation between Mr BK Lim and our Mr Gomez wherein you have instructed us that you are prepared to settle the following civil suits and actions against the parties (except MUI Bank and its related institutions) therein named:
>
> (1) Kuala Lumpur High Court
> Civil Suit D4–23–8–87
> The Ka Wah Bank Ltd v Hashbudin bin Hashim
>
> (2) Kuala Lumpur High Court
> Originating Summons No C3–31–369–86
> The Ka Wah Bank Ltd v Nadinusa Sdn Bhd and three (3) others
>
> (3) Kuala Lumpur High Court Suit
> Kod 314290-86
> Malayan United Bank Bhd v Nadinusa Sdn Bhd & The Ka Wah Bank Ltd
>
> In lieu of your discontinuing the said actions against the said parties you will accept the Supreme Finance shares which were the subject matter of the dispute between the parties. The parties will thereafter have no claims against each other. You will also cease to call upon or act on any other security that you may have against the parties in the suits or such third parties who may have provided security in respect of the facilities advanced to Nadinusa Sdn Bhd.
>
> Further, we confirm that we shall commence immediate negotiations with solicitors who are acting for the parties against whom you have institute legal action.
>
> Yours faithfully

On the following day, John Gomez & Associates wrote to Sri Ram & Co (P12) and referred to John Gomez's conversation with Kumar. A copy of P11 was enclosed for Sri Ram & Co to take instructions from their clients. It is important to note here that P12 was not extended to the bank.

The bank replied to John Gomez & Associates on receipt of P11. The letter (P13) reads as follows:

> Attn: Mr John Gomez

Dear Sirs

Re: Nadinusa Sdn Bhd

We refer to your letter dated 10 May 1988.

Whilst the bank is desirous to do a global settlement relating to the above account with the parties concerned along the line as recounted therein your letter, it appears that there is some misunderstanding with regard to the instructions that you are now acting for our bank.

Our Mr BK Lim's understanding was that you are a close friend of the solicitors acting for the concerned parties and if you could care to mention the bank's wishes to your solicitors' friends.

Be that as it may, if you wish to act for the bank in negotiating the proposed settlement, please let us know your fees in this deal. We would have to seek approval from higher authority to appoint your firm to act for the bank.

Yours faithfully
for THE KA WAH BANK LTD

(Sgd):
Authorized Signatures
Special Accounts Section

On 20 May 1988, Sri Ram & Co despatched the following reply (P15) to John Gomez & Associates:

We refer to your letter dated 11 May 1988 enclosing a copy of your fax dated 10 May 1988 to The Ka Wah Bank Ltd.

We are instructed by our client to accept the terms set out in your aforesaid fax to The Ka Wah Bank Ltd.

In fulfilment of the terms of the settlement herein reached, our clients' obligations shall extend only to arranging and or causing the necessary share certificates together with their duly executed transfer forms in escrow in respect of the Supreme Finance Bhd shares in question to be deposited with The Ka Wah Bank Ltd and/or their duly authorized nominees or agents.

Upon our client's depositing or causing to be deposited the said share certificates and transfer forms as aforesaid, The Kah Wah Bank Ltd undertakes to withdraw the pending actions instituted against Nadinusa Sdn Bhd and Encik Hashbudin Hashim, namely, Kuala Lumpur High Court Civil Suit D4–34–84–87, Kuala Lumpur High Court Originating Summons C3–31–369–86 and Kuala Lumpur High Court Originating Summons Kod 31–4290–86 with which each party to bear their own respective costs.

Upon our clients' depositing the said shares and duly executed transfer forms, your client is entitled to retain all benefits accruing to the said shares from the date hereof.

We trust you will find the above in order and we shall be making the necessary arrangements for our clients to fulfil the aforesaid obligations.

On the same date, John Gomez & Associates wrote to the bank as follows (P16):

A The Ka Wah Bank Ltd
232 Des Voeux Road
Cw Hong Kong

Attention: Mr BK Lim

Dear Sirs

B Re: Nadinusa Sdn Bhd's account with The Ka Wah Bank Ltd

We enclose herewith a copy of letter from Messrs Sri Ram, Zulkifli & Kumar acting for and on behalf of Nadinusa Sdn Bhd wherein the said solicitors have now confirmed the terms of settlement.

C We shall be taking steps to finalize the terms of this arrangement.

We would be obliged if you could kindly let us have your letter acknowledging receipt.

A copy of P16 was sent by John Gomez & Associates to Sri Ram & Co for the latter's information (P29).

D The bank replied by fax on 20 May 1988 (P17) stating:

We will instruct our solicitors Messrs Chooi & Co to write to Messrs Sri Ram, Zulkifli & Kumar to wrap up the proposed settlement relating to the above captioned.

Based on the above-mentioned letters and supported by the evidence E of John Gomez, his Lordship came to the following conclusions (p 68):

In my opinion the letter dated 10 May 1988 was a definite letter of offer. The terms of the offer as contained in the letter were not disputed by the bank. From the bank's letter dated 11 May 1988, it was the bank's desire to settle the Supreme Finance matter 'along the line' as stated in the letter dated 10 May 1988. From the bank's letter and from the evidence of John F Gomez, it is clear to me that the bank wanted John Gomez to put the offer to Messrs Sri Ram Zulkifli & Kumar. My conclusion is also supported by the letter written by Messrs John Gomez & Associates to Messrs Chooi & Co dated 24 August 1988 which inter alia, stated:

(d) on or about 10 May 1988, whilst speaking to your client's Mr BK Lim G over the phone, your Mr BK Lim had unsolicitedly enquired if the other matters concerning Encik Hashbudin/Nadinusa Sdn Bhd could be settled by way of relinquishing in favour of your client the disputed shares in Supreme Finance Bhd. In fact, to the best of our Mr John Gomez's recollection, the expression used by your client's Mr BK Lim was 'can we also resolve the other matters concerning this pain in the H area'.

(e) it was as a result of this conversation that our letter dated 10 May 1988 was written to confirm your client's intentions. In accordance with what had resulted in the previous instance relating to the Worldwide shares, our Mr John Gomez communicated these intentions to Messrs Sri Ram Zulkifli & Kumar and from which various letters has passed/ I conversations had taken place with the relevant parties.

His Lordship continued (at p 74):

> It is my finding that when the bank received the acceptance letter dated 20 May 1988 from Messrs Sri Ram Zulkifli & Kumar, an agreement was concluded in respect of the Supreme Finance matter. The agreement was concluded even though Messrs Chooi & Co were required by the bank to 'wrap up' the settlement and a draft settlement agreement was subsequently prepared.

On counsel's contention that BK Lim had no authority to make the offer in P11, his Lordship found as follows:

> In my opinion, BK Lim and the bank must have obtained the approval of the Government of Hong Kong to settle the Worldwide and Supreme Finance matters otherwise the statement of defence would have stated so. Exhibit D51 contained instructions on authorized signatures in respect of documents such as cheques, bills of exchange.
>
> After looking at exhs D50 and D51 and the bank's letter dated 11 May 1988 and after considering the other evidence and all the circumstances in this case, I am satisfied that BK Lim had the authority to make the offer through John Gomez. The bank's letter dated 11 May 1988 clearly endorsed what BK Lim did in respect of the Supreme Finance matter.

In the result, on 3 December 1993, the learned judge gave judgment against the bank and made an order on the following terms:

(1) (a) A declaration that the first suit has been compromised between Hashbudin and the bank (the first compromise).

(b) Specific performance of the agreement in the first compromise.

(2) (a) A declaration that the second and third suits have been compromised between Nadinusa and Hashbudin and the bank (the second compromise).

(b) Specific performance of the agreement contained in the second compromise.

(3) (a) A declaration that the bank is not entitled in law and in fact to execute and/or enforce or act upon the summary judgment dated 26 November 1987 obtained by it in the second suit.

(b) A permanent injunction against the bank restraining it from executing, enforcing or acting upon the said summary judgment in any manner howsoever against Hashbudin.

(4) (a) Damages for breach of contract in lieu of or in addition to specific performance.

(b) Interest thereon at such rate and for such period as this honourable court deems just in the circumstances.

(5) Costs.

(6) Liberty to apply.

The appeal

The bank appealed against the above decision of the trial judge on several grounds. However, before us, the appeal was argued on two principal grounds. The first ground is on the finding of his Lordship that the first,

second and third suits had been settled and compromised on the basis of the series of letters exchanged between the parties. The second ground relates to the question of an apparent or ostensible authority of an agent.

It will be recalled that the learned judge made separate findings concerning the three suits based on different sets of correspondence. In view of the above, Cik Ira Biswas, learned counsel for the bank, submitted that the learned judge erred in law and in fact in holding the first suit was settled on the basis of the bank's letter, P5, and Sri Ram & Co's reply, P9, when the uncontroverted documentary evidence showed that the suit was concluded on 31 May 1988 upon the terms stated in D24 and confirmed by D37. Her primary argument was that on its true construction, P5 did not contain any specific offer by the bank for the settlement of the first suit. The letter merely expressed an intention on the part of the bank to settle the suit by offering the 'proposed' terms of settlement and stating that: 'If the proposed settlement arrangements are acceptable to Mr Hashbudin's lawyers, please let the bank know'. Counsel further submitted that P5 was written as a reply and response to John Gomez's letter of 3 May 1988 seeking the bank's view for a settlement of the Worldwide shares. It was her contention that the first suit was in fact settled on the basis of Chooi & Co's letter (D24) to Sri Ram & Co who confirmed the acceptance of the terms of settlement in their letter, D37. In her view, D24 and D37 contained clear and unequivocal terms of settlement especially an unconditional and irrevocable undertaking given by Hashbudin that he would not file any action seeking an order restraining the sale of the shares, etc.

As for the second and third suits, Cik Biswas submitted that the learned judge also erred in his finding that they had been compromised on the basis of the letters marked as P11, P12, P13 and P15 and the oral evidence of John Gomez. In the first place, counsel argued that the learned judge was wrong to hold P11 as a 'definite letter of offer' when on the face of it, it was merely a letter written by a solicitor (John Gomez) purporting to confirm telephone instructions given by BK Lim of the bank to him. At any rate, BK Lim had no authority to make any offer on behalf of the bank and John Gomez or his firm never had any authority to act for the bank, where his authority to act was questioned by the bank in P13. Counsel contended that on the true construction of P11, the bank through BK Lim, merely requested John Gomez to make known to Sri Ram & Co of the bank's wishes for a settlement of the two suits along the line contained therein. P11 could not therefore be contrued as a definite letter of offer. Secondly, it was submitted that the learned judge was wrong in holding that P15 was an acceptance letter. He should have found that P15 contained new proposal regarding costs and therefore, at best, it amounted to counter-offer. Hence, the learned judge should have come to a conclusion that there was no agreement reached by the parties in respect of the settlement of the second and third suits. Counsel also submitted that his Lordship erred in law in failing to consider the effect of P17, which stated that the bank would instruct its solicitors, Messrs Chooi & Co to write to Sri Ram & Co to 'wrap-up' the proposed settlement. Counsel argued that the

emphasis in the letter was not on the expression 'wrap up', but the word 'proposed' suggesting that no settlement had yet been concluded. A

On the second ground, Cik Biswas submitted that his Lordship erred in holding that it was through John Gomez that the bank and Sri Ram & Co had negotiated and concluded the settlement of the first suit, when he found earlier that John Gomez was at all material times acting as the solicitor for Kaziz and that he was only sounding to BK Lim and Sri Ram & Co the possibility of the settlement of the first suit. Counsel further contended that even if his Lordship was correct in holding that John Gomez & Associates or John Gomez were held out by the bank to have the authority to negotiate and conclude the settlement of the first suit, the learned judge was wrong to hold that such authority to negotiate was similarly conferred on John Gomez in respect of the settlement of the second and third suits. On the authority of BK Lim, counsel submitted that he had no authority to make the offer contained in P11 through John Gomez in view of the expressed provisions of the management agreement, D50, and the authorized signatories book, D51. She complained that the learned judge had misconstrued these exhibits. B C D

Conclusions

In dealing with the first ground of appeal, the question turns upon the construction and effect of the correspondence exchanged between the parties. E

In our view, the proper approach is to consider the whole correspondence to see whether upon their true construction there is to be found in them an offer substantially accepted in terms which constitute a contract. In *Gibson v Manchester CC* [1979] 1 WLR 294, the question before the Law Lords was whether in the correspondence between the parties there could be found a legally enforceable contract for the sale of a dwelling house by the Manchester Corporation to Mr Gibson. In the Court of Appeal, Lord Denning MR rejected the conventional approach of looking to see whether upon the true construction of the documents relied upon there can be discerned an offer and acceptance. Geoffrey Lane LJ (dissenting), however, adopted the conventional approach. Allowing the appeal, the House of Lords held that upon the true construction of the documents relied upon as constituting a contract, there never was an offer by the corporation, acceptance of which by the tenant was capable in law of constituting a legally enforceable contract for the sale of the house. At p 297, Lord Diplock stated: F G H

> My Lords, there may be certain types of contract, though I think they are exceptional, which do not fit easily into the normal analysis of a contract as being constituted by offer and acceptance; but a contract alleged to have been made by an exchange of correspondence between the parties in which the successive communications other than the first are in reply to one another, is not one of these. I can see no reason in the instant case for departing from the conventional approach of looking at the handful of documents relied upon as constituting the contract sued upon and seeing I

whether upon their true construction there is to be found in them a contractual offer by the corporation to sell the house to Mr Gibson and an acceptance of that offer by Mr Gibson. I venture to think that it was by departing from this conventional approach that the majority of the Court of Appeal was led into error.

The first suit

We find his Lordship had adopted the correct approach by considering the eight letters pleaded in para 9(b) of the statement of claim in arriving at his conclusion that an agreement to compromise the first suit was concluded on the basis of P5 and P9 and not based on D24 and D37. He found the bank's letter dated 4 May 1988 (P5) constituted a definite offer and Sri Ram & Co's reply of 10 May 1988 (P9) an acceptance of the said offer to compromise the first suit in respect of the Worldwide shares. He gave the following reasons (AR Vol 1A, pp 53–54):

> I think the bank's letter dated 4 May 1988 contained a definite offer to conclude an agreement. In that letter, the bank said that it would accept all the 1.3m shares in Worldwide together with transfer forms for all 1.3m shares duly executed in blank. The bank agreed to discontinue the Kuala Lumpur High Court Civil Suit No C4–23–3447–88. It was also a term of the offer that Hashbudin must deliver to Messrs Chooi & Co duly executed blank transfer forms in respect of the 175,000 Worldwide shares. It was also a term of the offer that Hashbudin must undertake not to file any court injunction restraining the transfer of all the 1.3m Worldwide shares.

His Lordship continued:

> On 10 May 1988, Messrs Sri Ram Zulkifli & Kumar wrote to the bank stating that Hashbudin agreed to the terms set out in the bank's letter dated 4 May 1988. From this letter, it is clear to me that Hashbudin agreed to deliver the blank transfer forms in respect of the 175,000 Worldwide shares. He also agreed to undertake not to file any court injunction to restrain the transfer of the 1.3m shares.

He concluded thuswise:

> Looking at the two letters, the other related letters and the evidence in this case, I am satisfied that it was clearly the intention of the parties to conclude an agreement and it is my finding that an agreement was concluded on 10 May 1988 in respect of the first suit.

Having examined the correspondence exchanged between the parties, we are in complete agreement with the reasons and conclusion of the learned judge that an agreement to compromise the first suit was concluded on the basis of P5 and P9. Firstly, we agree with his Lordship that P5 is a letter of offer containing terms of settlement. Counsel contended before us that P5 was merely a reply to John Gomez & Associates' letter, P4, which sought the bank's view on the proposed settlement of Worldwide shares account. With respect, we do not agree with her contention. In our view, P5 must be read together with and in the light of P3, P4 and P7 and P8. Whilst we agree that P5 was a reply to P4, looking at its content, it could be inferred from the terms mentioned therein that the bank was making an

offer to settle the first suit whereby it confirmed that it would agree to discontinue the first suit upon the terms specified therein. An offer is an expression of willingness to contract on specified terms made with the intention that it shall be binding as soon as it is accepted by the offeree (Treitel, *The Law of Contract* (9th Ed, 1995) p 8). Thus, the letter stated that firstly, it would accept all the 1.3m Worldwide shares together with the transfer forms duly executed in blank as full and final settlement of Hashbudin's personal loan account with the bank. Secondly, it would agree to discontinue the first suit with each party having no claim against the other and that each party to bear its own costs. Thirdly, Hashbudin and/or his nominee must deliver to the bank's solicitors, Chooi & Co, duly executed blank transfer forms in respect of the remaining 175,000 Worldwide shares. Fourthly, Hashbudin and/or his nominee must undertake not to file any injunction restraining the transfer of the 1.3m Worldwide shares. The letter concluded with a request that the bank be informed if the proposed settlement arrangements were acceptable to Hashbudin's lawyers. Six days later, on 10 May 1988, the bank wrote P7 enquiring from John Gomez & Associates whether the proposed terms of settlement mentioned in P5 were acceptable to Sri Ram & Co. Reading the whole letter together with the other correspondence referred to above, the only conclusion we can arrive at is that P5 contains an offer to settle the first suit on the terms stated therein.

We also agree with his Lordship that P9 is an acceptance of P5. By P9, Sri Ram & Co on behalf of their client, accepted the offer and confirmed their agreement to the terms set out in P5. Hence, an agreement to settle the first suit was concluded when Sri Ram & Co communicated their client's acceptance of the terms of the offer in P5. On P9, his Lordship considered whether the solicitors had the authority to accept the offer on behalf of their client who was abroad. He held that the solicitors had the authority relying on a High Court decision *Yap Chee Meng v Ajinomoto (M) Bhd* [1978] 2 MLJ 249, where the case of *Mathews v Munster* (1888) 20 QBD 141 was referred. There, the English Court of Appeal held that the consent of the client was not needed for a matter which was within the ordinary authority of counsel, and if a compromise was entered into by counsel in the absence of the client, the client was bound. We think his Lordship had correctly followed *Mathews*. In short, we agree with his conclusion.

On the role and involvement of John Gomez in the settlement of the first suit, we agree with the primary finding of the learned judge that he was at all material times acting on behalf of Kaziz, negotiating with the bank for the purchase of 1.3m Worldwide shares. However, based on P3 and P4, his Lordship drew an inference that it was through John Gomez & Associates that the bank and Sri Ram & Co later negotiated with each other for the settlement of the first suit. From the correspondence and the background facts against which the parties had conducted the negotiations, we agree with his Lordship's conclusion. We hasten to add that on the true construction of the correspondence, we find John Gomez and his firm had no authority to act for the bank.

As for BK Lim, we need only advert to P5 which confirmed that this letter of offer duly bore the authorized signatories, who had the authority to sign on behalf of the bank.

In the result, upon the true construction of the correspondence which are highlighted above, we find the learned judge did not err in law or in fact in holding that the first suit had been compromised.

The second and third suits

Turning to the second and third suits, the question for our decision is whether his Lordship was correct in construing P11 as a definite letter of offer and P15 as an acceptance of the said offer.

We note that the learned judge did not give reasons for his conclusion that P11 contained a definite offer to settle the two suits. He appeared to have accepted oral evidence of John Gomez, who stated that P11 was a letter of offer. See AR Vol 1A at p 64. With respect, his Lordship misdirected himself in relying on the oral evidence. Whether or not P11 constitutes a definite offer is a question of construction (*Gibson v Manchester CC*). His Lordship has to construe P11 and read it together with the correspondence pleaded in para 10(b) of the statement of claim. On our part, on its true construction, we find P11 is not a letter of offer. In our view, P11 was written by John Gomez to the bank for the purpose of confirming an earlier telephone conversation between him and BK Lim of the bank concerning the bank's desire to settle the two suits on the terms mentioned therein and for John Gomez to mention this to Hashbudin's solicitors. This inference is supported by the bank's immediate reply, P13, which in the context of P11 made particular reference to John Gomez being a 'close friend of the solicitors acting for the concerned parties' and if he 'could care to mention the bank's wishes' to his solicitor friend. It is common in the business world that when parties negotiate by way of correspondence with a view to making or concluding a contract, many preliminary communications may pass between them before a definite offer is made. Reading P11 together with P13 and taken as a whole, we view P11 as nothing more than a preliminary communication between John Gomez & Associates and the bank confirming the earlier discussion between John Gomez & Associates and BK Lim regarding the possible settlement of the two suits involving the Supreme Finance shares. In the circumstances, with respect to the learned judge, we disagree with his finding that P11 was a definite letter of offer.

We would add that in his evidence, John Gomez admitted that when he wrote P12 to Sri Ram & Co enclosing a copy of P11, he was not acting for the bank (see p 130G of the appeal record). Also, how could P11 constitute an offer by the bank when it was addressed to the bank? Furthermore, John Gomez's lack of authority is obvious from the last paragraph of the bank's letter dated 11 May 1988 to John Gomez (P13) which we would, in view of its significance, reproduce below, at the risk of being repetitive:

> ... if you wish to act for the bank in negotiating the proposed settlement, please let us know your fees in this deal. We would have to seek approval from higher authority to appoint your firm to act for the bank.

From P13, his Lordship inferred and concluded that the bank had wanted John Gomez to make an offer of settlement to Sri Ram & Co. Again, we find this was a wrong inference and conclusion. In our view, P13 is a reply to P11 written with the primary purpose of explaining at the earliest opportunity 'some misunderstanding' arising from P11 regarding the instructions that John Gomez was acting for the bank. In fact, the last paragraph of P13 put beyond dispute that neither John Gomez nor his firm had any authority to act for the bank to negotiate for the settlement of the two suits. The letter further mentioned about the bank being desirous of doing a global settlement of Nadinusa's account 'along the line' proposed in P11 and the fact that John Gomez was a close friend of the solicitors acting for Nadinusa, and if the latter could care to mention its wishes to his solicitor friend. In the circumstances, it is wrong to conclude that the bank wanted John Gomez to make an offer on its behalf. On the contrary, in our view, it is a reasonable inference that BK Lim was merely requesting John Gomez if he could sound out to V Kumar of the bank's desire to settle the two suits 'along the line' mentioned in P11 and to get the latter's response.

Even assuming we are wrong in holding P11 was not a letter of offer, then, in our opinion, P15 could not in law constitute an acceptance. According to *Chitty on Contracts*, 26th Ed (1989) Vol I, para 54, p 44, 'an acceptance is a final and unqualified expression of assent to the terms of the offer'. But, where the reply is qualified or attempts to vary the terms of the offer or attempts to accept an offer on new terms (not contained in the offer), then such a reply is not a communication of an acceptance but may be a rejection accompanied by a counter-offer which the original offeror can accept or reject (paras 56, 95, pp 46, 72). In the light of the conditions put forward by Sri Ram & Co in P15 that the bank gave an undertaking to withdraw the two suits and that each party to pay their own costs, which terms were not in P11, it is our conclusion that P15 does not constitute a final acceptance of the bank's terms of the offer, but an attempt by the offeree to vary the original offer in P11 to include new terms on undertaking and costs. In the circumstances, there was no concluded contract.

For the above reasons, it is our finding that the learned judge erred in law on his finding that from the evidence and the exhibits, the parties had come to a definite and complete agreement in respect of the settlement of the second and third suits.

In the light of the above findings and for reasons stated herein, our judgment is as follows:

(1) Appeal against the finding of the trial judge in respect of the compromise of the first suit is hereby dismissed. Accordingly, we affirm paras 1(a), (b), and 4(a) (in relation to the first compromise only) of the order of the court below as contained in the judgment dated 3 December 1993.

A We find para 4(b) vague and is hereby set aside.

(2) Appeal against the finding of the learned judge in respect of the second and third suits be allowed. There had been no compromise of these two suits. Therefore, paras 2(a) and (b), 3(a) and (b) are set aside.

B (3) Paragraph 5 on costs is set aside. There shall be an order that the costs here and below be taxed, if not agreed; that half of the taxed costs in the court below be paid by the appellant/defendant to the respondents/plaintiffs; and that half of the taxed costs of this appeal be paid by the respondents to the appellant.

C (4) Deposit to be refunded to the bank.

Order accordingly.

Reported by David Lai

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